

Calendar No. 128.

63D CONGRESS, }
2d Session. }

SENATE.

} REPORT
} No. 160.

CREDENTIALS OF BLAIR LEE AS SENATOR FROM MARYLAND.

JANUARY 19, 1914.—Ordered to be printed.

Mr. KERN, from the Committee on Privileges and Elections, submitted the following

REPORT.

[To accompany S. Res. 247.]

The Committee on Privileges and Elections, to whom was referred the credentials of Blair Lee as a Senator from the State of Maryland, have considered the same, and submit the following report:

In this case the governor of the State of Maryland has certified, under the seal of his State, as follows:

That at an election held on Tuesday, November 4, 1913, pursuant to the law of the State of Maryland and a writ of election issued by the governor of that State in compliance with the provisions of the seventeenth amendment to the Constitution of the United States by the electors in said State having the qualifications requisite for electors of the most numerous branch of the State legislature, Blair Lee, of Montgomery County, was by said electors duly chosen a Senator from said State in the Senate of the United States to fill the vacancy in the unexpired term of Isidor Rayner.

That at said election so held as aforesaid on Tuesday the 4th day of November, 1913, the candidates for the said office of United States Senator were Blair Lee, Democrat; Thomas Parran, Republican; George L. Wellington, Progressive; Finley C. Hendrickson, Prohibitionist; and Robert J. Fields, Socialist, each of said candidates having been duly nominated in accordance with the primary-election law of said State.

That the name of each of said candidates was placed upon the ballots at the said election held as aforesaid, on Tuesday, November 4, 1913, as required by the laws of said State, and the returns from said election having been duly canvassed by the board of State canvassers in accordance with law, the result of said election has been declared and certified by said board as follows:

That—

	Votes.
Blair Lee received.....	112, 485
Thomas Parran received.....	73, 300
George L. Wellington received.....	7, 033
Finley C. Hendrickson received.....	2, 405
Robert J. Fields received.....	2, 982

all of which appears from the certified copy of the report made by the board of State canvassers, and hereto annexed, which I certify to be full, true, and correct, as follows:

DECLARATION OF THE RESULT OF THE ELECTION OF 1913 FOR THE OFFICE OF UNITED STATES SENATOR.

(Made by the State board of canvassers.)

We, the undersigned, constituting a majority of the board of State canvassers of the State of Maryland, in pursuance of the power and authority vested in us, under and by virtue of the provisions of section 85 of the election law, do hereby certify that at an election held in said State on Tuesday, November 4, 1913, for a United States Senator to fill the unexpired term of the late Senator Isidor Rayner, it appears from the certified copies of the returns of said election that—

	Votes.
Blair Lee received.....	112, 485
Thomas Parran received.....	73, 300
George L. Wellington received.....	7, 033
Finley C. Hendrickson received.....	2, 405
Robert J. Fields received.....	2, 982

We therefore determine and declare that Blair Lee, having received the greatest number of votes cast for the several candidates for said office, has been and is duly elected United States Senator to fill the unexpired term of the late Senator Isidor Rayner.

In witness whereof we have hereunto set our hands this 20th day of November, 1913.

ROBERT P. GRAHAM,
Secretary of State.

EMERSON C. HARRINGTON,
Comptroller of the Treasury.

MURRAY VANDIVER,
State Treasurer.

C. C. MAGRUDER,
Clerk of the Court of Appeals.

Included in the same certificate of the governor is a copy of the writ of election issued by him on the 2d day of August, 1913, which is as follows:

WRIT OF ELECTION.

To the people of the State of Maryland, and to the members of the several boards of supervisors of elections of Baltimore City and the several counties of the State, and to the sheriffs of Baltimore City and the several counties of the State, and to the board of police commissioners for the city of Baltimore, greeting:

Whereas a vacancy now exists in the term of a United States Senator from Maryland, caused by the death of the late Senator Isidor Rayner; and

Whereas I have heretofore, by virtue of the authority vested in me by the Constitution of the United States, temporarily appointed Senator William P. Jackson to occupy a seat in the United States Senate "until the next meeting of the legislature" of this State:

Therefore, I, Phillips Lee Goldsborough, governor of the State of Maryland, acting by and under the authority and direction contained in the seventeenth amendment to the Constitution of the United States, hereby issue, publish, and declare this my writ of election for a special election to be held throughout the State of Maryland on Tuesday, the 4th day of November, 1913; and I do hereby direct that a special election shall be held on that day in order that there may be chosen at said election a Senator of the United States from the State of Maryland to fill said vacancy and to represent the State of Maryland in the Senate of the United States until the end of the term for which said Senator Isidor Rayner was originally elected.

And I further order, declare, and direct that the Senator to be chosen by virtue of this writ shall be nominated and elected in conformity with all the provisions of the general election laws and State-wide primary election laws of this State made and provided for the nomination and election to an office filled by the vote of all the registered voters of the State of Maryland.

To this end and as authority and direction therefor have you then and there this writ.

Witness my hand as the governor of the State of Maryland this 2d day of August, 1913, and the great seal of the State of Maryland.

[GREAT SEAL.]

By the governor:

P. L. GOLDSBOROUGH.

ROBERT P. GRAHAM,
Secretary of State.

Your committee holds that the certificate of the governor of Maryland sets forth all the facts necessary to show the election of Blair Lee in substantial conformity to the provisions of the seventeenth amendment to the Constitution of the United States and in accordance with the laws of the State of Maryland and to entitle him to a seat in the Senate of the United States.

The facts in the case, about which there is no dispute, are as follows:

Isidor Rayner was elected United States Senator by the Legislature of Maryland, in January, 1910, for a term of six years, ending March 4, 1917.

On November 25, 1912, Senator Rayner died, and four days later the governor of Maryland, in pursuance of the constitutional provision that "if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointment until the next meeting of the legislature, etc.," appointed William Purnell Jackson, who, upon presenting his credentials, was sworn in as Senator.

The first session of the legislature of Maryland since that time began on January 7, 1914.

On May 31, 1913, the seventeenth amendment to the Constitution of the United States went into effect by the proclamation of the Secretary of State.

That amendment provides among other things, that "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies, provided that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

In obedience to this constitutional requirement and acting upon the advice of the attorney general of the State, the governor of Maryland on the 2d day of August, 1913, issued a writ of election to fill the vacancy in the representation of the State in the Senate, which had been caused by the death of Senator Rayner, and to which Senator Jackson had been temporarily appointed prior to the adoption of the amendment.

The writ of election directed that the election should be held on Tuesday, November 4, 1913, and that the Senator should be nominated and elected in conformity with all the provisions of the general election laws, and State-wide primary election laws of Maryland, made and provided for the nomination and election to an office filled by the vote of all the registered voters of that State.

This writ of election, thus issued by a Republican governor, acting upon the advice of a Democratic attorney general, was acquiesced in and acted upon by all the political parties of the State.

Proceeding under the provisions of the State primary laws, Blair Lee, Thomas Parran, George L. Wellington, Finley C. Hendrickson, and Robert J. Fields became the candidates, respectively, of the Democratic, Republican, Progressive, Prohibition, and Socialist parties.

During the campaign which followed, the propriety of the governor's action in calling the election was not challenged anywhere within the State, and the vote cast for Senator at the election was as great as that cast for any State officer balloted for at that election.

When the voters of Maryland went to the polls on that day they found upon their ballots the names of the five candidates for United States Senator, and substantially all the electors availed themselves of the new privilege so recently conferred by the seventeenth amendment by registering in the usual orderly and lawful way, their choice as between the candidates.

That the election was fair, entirely untainted by fraud or corruption of any kind, is freely conceded, and that the result is a free, full, and fair expression of the popular will of the voters of Maryland is nowhere denied.

The seventeenth amendment required that the governor should issue his writ of election in case of the happening of a vacancy in the representation of his State. Such a vacancy had happened. The people under the provisions of the new amendment then in force had the right to elect. The only question to be considered was as to whether there was in existence appropriate election machinery for the expression of the popular will, and it was found that such machinery had been provided both for nomination and election. In other words, there was no obstacle in the way of an orderly and lawful election as contemplated by the seventeenth amendment.

Under these conditions the governor issued the writ of election, nominations were made, and the election held, with the result that Mr. Lee received 112,485 votes, while the total vote of all the opposing candidates was 85,720.

As already stated, all political parties participated in the election, and it is a matter of gratification that all have acquiesced not only in the action of the governor in calling the election but in the result.

The Republican governor of Maryland who ordered the election has not hesitated to certify to the election of a Democratic Senator, and your committee is unable to discern any reason why this election of a United States Senator by the people of a sovereign State—an election conceded to be fair in all respects—should be questioned here.

It is contended by Senator Jackson that if the election of Mr. Lee should be found to be valid in all respects, yet he would not be entitled to a seat in this body until the 7th of April, 1914, that being the day fixed by the statute of Maryland for the adjournment of the legislature of that State, which is now in session. His contention is that although section 3, Article I, of the Constitution, under which his appointment was made, provided that "if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature," yet that under legislative construction of that section his tenure of office would have continued until an election by the legislature; and in case of a failure by

the legislature to elect, until the end of the session of that legislature; and that under the last clause of the seventeenth amendment, which provides that "this amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution," his right to a seat in this body can not be challenged until the expiration of the extreme limit of time which he might have held his seat if the seventeenth amendment had not been adopted.

The committee gave much consideration to these contentions, but have been unable to yield their assent thereto.

Under the provisions of the Constitution which were in force at the time of Senator Jackson's appointment, his tenure of office was most uncertain of duration.

First. The governor, immediately after making the appointment, might have called the legislature in special session, which might have proceeded to the election of a Senator, in which event Senator Jackson's term would have ended immediately upon the presentation and approval of the credentials of the person so elected.

Second. If the Legislature of Maryland, in regular session, having the power so to do, should elect a successor to Senator Rayner at the time fixed by the Federal statute in force prior to the adoption of the seventeenth amendment, the person so elected would be entitled to his seat here as soon as the Senate could pass upon his credentials, or

Third. According to the construction contended for, in the event that the legislature in regular session should fail to elect a Senator, the Senator might have held office until the end of that session.

Senator Jackson's term might have been a very short term, as in the event of an election at a special session of the legislature; it might have been prolonged until an election by the legislature in regular session, or it might be still further prolonged to the end of the session of a legislature that had failed to elect. But in any event he could only hold until the vacancy was filled by an election, or until the body having the duty to elect had failed in its duty and adjourned without performing it. In no event could he hold the office after a valid election had occurred. Now, when the seventeenth amendment was adopted and became operative, the legislature could no longer elect a Senator, so that Senator Jackson's term could not be limited by a legislative election, and such being the case, the position that he should now hold office until a legislature which has no power to elect shall fail to elect and adjourn without electing is not regarded as tenable.

Your committee is of the opinion that Senator Jackson's right to a seat in this body terminates upon the election and qualification of the person lawfully elected to fill the vacancy referred to, without regard to the manner of such election, and that the vacancy occasioned by the death of Senator Rayner having been filled by the election of Blair Lee, Senator Jackson has no right to hold his seat longer and exclude from this body the man who has been regularly and fairly elected by the voters of Maryland and duly commissioned by the governor of that Commonwealth.

Calendar No. 128.

63D CONGRESS, }
2d Session. }

SENATE.

} REPT. 160,
} Part 2.

CREDENTIALS OF BLAIR LEE AS SENATOR FROM MARYLAND.

JANUARY 21, 1914.—Ordered to be printed.

Mr. SUTHERLAND (for himself and Mr. DILLINGHAM), from the Committee on Privileges and Elections, submitted the following

VIEWS OF A MINORITY.

[To accompany S. Res. 247.]

I find myself unable to agree with the majority of the Committee on Privileges and Elections in holding that Blair Lee is entitled to a seat in this body as a Senator from the State of Maryland. The report of the committee in support of the applicant's right to the seat, while it recites the facts in detail and discusses at some length the contention of Senator Jackson, the sitting member, that he is entitled to retain his seat until the adjournment of the Maryland Legislature, fails to set forth the reasons for the conclusion of the committee that the election of Blair Lee was valid. The precise ground upon which this conclusion of the committee rests is therefore more or less a matter of surmise.

I.

It was contended before the committee that the election of Mr. Lee could be sustained upon the grounds (1) that the provisions of the seventeenth amendment, that "When vacancies happen in the representation of any State in the Senate the executive authority of such State shall issue writs of election to fill such vacancies," carries with it as an incident the power on the part of the governor, thus authorized to issue a writ of election, to fix the conditions upon which the election shall be held; and (2) that the laws of Maryland in force prior to the adoption of the seventeenth amendment constitute sufficient legislative foundation for the election. I am unable to agree to either view.

1. The seventeenth amendment provides that two Senators from each State shall be elected by the people thereof, instead of being chosen by the legislature, as provided in the original Constitution.

This amendment, however, left intact paragraph 1, section 4, article 1 of the Constitution, which provides:

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

This provision is mandatory and exclusive in form. The right and duty of prescribing the various elements of an election is thereby devolved upon the legislature alone. The legislative authority is not limited to general elections; it applies to all elections, special as well as general.

By the seventeenth amendment when a vacancy happens the authority of the executive is limited to issuing the writ of election, a purely ministerial act. If there were no other provision in the constitution governing the subject there might be reason for claiming that the authority to issue a writ of election carried with it by implication the authority to fix the time, places, and manner of holding such election, but here the constitution in express terms devolves the latter power upon the legislature, and it is contrary to all reasonable rules of construction to hold that an authority thus *expressly* vested in one body is taken away and given to another by mere *implication*. The meaning of the constitution seems to be perfectly clear. It is that the legislature must fix the time, places, and manner of holding *all* elections, including elections to fill vacancies, and, this having been done, in case of a vacancy the governor issues his writ of election, but such legislative foundation must exist before the executive act of issuing the writ can be effective. The reasons are obvious. The legislature will prescribe these conditions by general law which will be the same in all cases, while if the power is held to be in the governor to fix them in connection with the issuance of his writ the rules may differ in every case. In one case he may call an election upon 2 days' notice, in another upon 60 days' notice; in one case he may prescribe that the places of holding the election shall be at the various polling precincts, in another at the various county seats; in one case that the manner of voting shall be by Australian ballot, in another by a totally different form of vote. If the governor has the incidental power to fix the time, it follows of course that he likewise has the power to fix the places and manner, since all are equally necessary to an election. Every condition of an election would therefore rest not upon uniform law, but upon the unrestrained discretion of the governor in each case. Such a result, as it seems to me, was never contemplated by the constitution.

The legislature has been directed, without qualification, to prescribe the time, places, and manner of holding elections. Is not a *special* election an election? But to hold that the governor has this power in case of a vacancy is to read into the constitutional provision an exception denying the power of the legislature in the case of special elections and to introduce a limitation, which the Constitution does not contain, confining the power of the legislature to *one class* of elections, when the plain words extend it to *all* elections. I can not assent to the view that a power which has been *expressly* vested in one body can be thus held to belong to another by *implication*.

If the power to fix the time, places, and manner is to be exercised by the governor in the case of elections to fill vacancies, what becomes

of the reserve power of Congress to "make or alter such regulations"? In the general clause already quoted the Constitution has been careful to reserve to Congress the power to make or alter such regulations; namely, such regulations as the legislature is authorized to prescribe. It was evidently contemplated that the legislature might in some instance fail to prescribe the time, places, and manner of holding elections, in which event Congress could supply the omission by itself making the regulation; and it was further contemplated—and this is no less important—that the legislature might make unwise or improper regulations, in which event Congress could correct them by alteration; but if the power to make regulations in the case of *special* elections belongs to the governor Congress is powerless to interfere, however much it may disapprove the action of the governor, since no supervisory power over the action or want of action on the part of the governor is reserved. It is not to be supposed that the Constitution intended that the supervisory power of Congress deemed so essential in the case of elections generally should be entirely wanting in the case of special elections.

2. It is, however, contended that if legislative authority for the holding of this special election be necessary, such authority is to be found in the statutes of Maryland in force prior to the adoption of the seventeenth amendment. It is conceded that no such legislation has been passed since the adoption of the seventeenth amendment.

The report of the committee unfortunately contains no reference to any such statute, so that I am not able to refer with certainty to the provisions of the Maryland law that are particularly relied upon. I have, however, read with some care the various sections of the Maryland election law which by any possibility could be held to apply to the election of a United States Senator either for a regular term or to fill a vacancy. I have not been able to find any language which in terms or by the most liberal construction seems to me to apply. The constitution of Maryland provides for the election in specific terms of various State officers, naming them separately, and the laws of Maryland provide specifically for the election of certain other State officers and, in addition, for the election of Representatives in Congress and presidential electors. Certainly these constitutional provisions and statutes applying in terms to specifically named officers can not by any stretch of interpretation be held to apply to a United States Senator. The other statutes of Maryland relating to elections simply prescribe the character of the election officials, their duties, the registration of voters, and similar matters. In addition to this *there is a specific primary law expressly applicable to United States Senators*. This law prescribes how nominations for United States Senators shall be made at primary elections and provides that the names of person for whom the greatest number of votes were cast by each political party, respectively, shall be certified to both houses of the General Assembly of Maryland (acts of 1908, chap. 400, sec. 7); and provides further that the candidate so receiving the greatest number of votes cast by the voters of said party in any county, etc., shall be entitled to and receive the votes of the candidates of such political party who may be elected to represent said county, etc., in the general assembly next ensuing, for the position of United States Senator for the term to be filled by the said general assembly (*idem*, sec. 9).

It not only appears, therefore, that there is no affirmative provision in the Maryland statutes covering the election of United States Senators by the people, but any such construction of the statutes is negated by this primary law affirmatively providing for a popular *nomination* by the people and an *election* by the legislature.

The attention of the committee, however, was called to the general interpretation clause found in the article on elections, which reads as follows: "The word 'election' as used in this article shall be construed to include elections had within any county or city for the purpose of enabling voters to choose some public officer or officers under the laws of this State or of the United States," and it was urged that this evidenced an intention on the part of the legislature that the laws by which the election machinery is provided and regulated should apply to United States Senators. An interpretation clause, however, as it has been many times held, will not alter the sense of a word or phrase the specific meaning of which to the contrary is made perfectly clear by the context.

The legislature sometimes recognizes this rule by express language, as for example in section 1 of the Revised Statutes of the United States where the interpretation of various words is declared "unless the context shows that such words were intended to be used in a more limited sense." But the rule is the same whether included in the interpretation clause or not. Thus in *Dean of Ely v. Bliss* (2 De G. M. & G. 471), it is said:

There has been a great deal of discussion, which I am not surprised at, in regard to the meaning of the words; but it is to be observed, that although the meaning of the words is defined by the statute, yet that statute declares (what would have been supplied if it had not been so expressed) that the words are not to have that meaning attached to them in the interpretation clause if a contrary intention appears.

The general rule is stated in *Wilberforce on Statutes*, page 297, that—

The real purpose of an interpretation clause is to define the meaning of words when nothing else in the act is opposed to the particular sense which is thus placed upon them.

In 2 *Sutherland's Statutory Construction*, section 359, some English cases are cited to the effect that the statutory interpretation clause "could be satisfied by applying it to the word where there was nothing in the context to interpret it otherwise," and that the clause "should control where the words occur without being accompanied by any others tending to show their meaning; or to interpret words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain." And again, in section 360, the same author says:

On the other hand, general statutory definitions and rules of interpretation will apply when the statute in question is not plain; or, in other words, does not define and interpret itself. Where positive provisions are at variance with the definitions it contains, the latter, it seems, must be construed as modified by the clear intent of the former, on the principle that the special controls the general.

So it is said in 36 *Cyc.*, 1106:

But the interpretation clause should be used only for the purpose of interpreting words that are ambiguous or equivocal and not so as to disturb the meaning of such as are plain.

In L. R. 7 H. of L., 493, it is said:

Even for the purpose of the act of Parliament, it appears to me that the interpretation clause does no more than say that where you find in the act those words "personal chattels" they shall, unless there be something repugnant in the context, or in the sense, include fixtures.

In the case of the Queen against the Justices of Cambridgeshire, 7 Ad. & El. page 491, the court said:

But we apprehend that an interpretation clause is not to receive so rigid a construction; that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term where the circumstances require that they should.

Other cases to the same effect might be cited.

Applying these rules to the case under consideration it seems clear that the interpretation clause can not be held to extend the various or any of the election laws of Maryland to the election of a United States Senator, since in every case where the word "election" is used the intention of the legislature to not have it so applied unmistakably appears. Not only is this so, but this intention is emphasized by the specific provisions of the Maryland statutes providing for the nomination of United States Senators by the people and their election in pursuance of such nominations by the legislature. That the interpretation clause is not to receive the rigid application for which Mr. Lee's advocates contend is apparent upon a moment's reflection. The language of this clause is that the word "election" is to include elections of officers under the laws of the State or the United States.

Specific provision is made for the election of Representatives in the Congress of the United States. Is the word "election" as here used to be construed to include elections of State officers or to include the election of any other than Representatives in Congress? Clearly not. Again, provision is made for the election specifically of the mayor of Baltimore city on the Tuesday next after the first Monday in the month of May, 1899, etc. Is the word "election" here to be construed to include the election of officers to be elected under any law of the United States or any other officer than the one specifically named? Again, clearly not. These illustrations emphasize the rule laid down by the authorities that the interpretation clause is intended only to be resorted to in cases of doubt and is not to be followed where the contrary intention is clearly apparent in the substantive legislation.

II.

I find myself also unable to agree with the majority of the committee with respect to the time when Senator Jackson's term of office will expire.

The seventeenth amendment contains the following saving clause:

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

I think this provision was inserted out of abundance of caution to prevent the seventeenth amendment being so construed as to legislate any sitting Member out of office. In the case of a Member elected

for a regular term its effect is to preserve to him his seat until the expiration of the term for which he was elected. In the case of such a Senator the precise day when his term ends is fixed, but it seems to me it can not be doubted that it was also intended to save the seat of a Member who had been chosen by the governor to fill a vacancy. True, in that case the term does not end upon a particular day; it ceases upon the happening of an event, or rather, as will be shown in a moment, upon the happening of one or the other of two events.

In this view, when does Senator Jackson's term expire? The clause was intended to allow the sitting Member to serve the term which he would have served if the seventeenth amendment had not been adopted. Senator Jackson was appointed to fill the vacancy caused by the death of Senator Rayner, under the provisions of article 1, section 3, paragraph 2, which provides that—

If vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

It has been several times held by the Senate, after thorough consideration, that the appointee in such case holds until the incoming legislature elects his successor or finally adjourns without an election. If this holding is not to be repudiated by the Senate it follows that the term of Senator Jackson was until the happening of one or the other of these events, namely, the election by the ensuing legislature of his successor or the final adjournment of the legislature without an election. Under the seventeenth amendment the legislature is now precluded from electing a successor and Senator Jackson's term would, therefore, not expire until the adjournment of the Legislature of Maryland, which, by constitutional limitation, must occur by April 7 of this year.

It is said, however, that inasmuch as the seventeenth amendment provides for election by the people and inhibits an election by the legislature, that Senator Jackson's term would expire when his successor was elected by the people. But to so hold does violence to the language of the saving clause. True, the seventeenth amendment provides for an election by the people, but notwithstanding this the term of Senator Jackson is not to be affected by this or any other provision of the seventeenth amendment. It is, therefore, as though the saving clause had said: "The foregoing provision for an election by the people is not to be so construed as to affect the term of any Member heretofore chosen." In other words, the provision for an election by the people does not become operative so far as Senator Jackson's seat is concerned until he has served the term which he would have served if the amendment had never been adopted.

The former decisions of the Senate as to the term of an appointee of a governor are borne out by the language of the constitution. The executive is authorized "to make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies." Obviously the phrase "until the next meeting of the legislature" qualifies the power of the governor to appoint and not the term of service of his appointee. The power of the governor to make a temporary appointment must be exercised before the next meeting of the legislature. The meeting of the legislature puts an end to his power.

The constitution, in this particular, recognizes two authorities having the power to choose Senators: (1) The legislature, being the primary appointing power; and (2) the governor, being the secondary appointing power.

When a vacancy happens during the recess of the legislature that primary authority is incapable of acting and continues to be incapable of acting so long as it is in recess. During that period, and that period only, the secondary appointing power, namely, the governor, may act. Having acted, the Constitution contemplates that the next incoming legislature must select his successor, because it says, speaking of the legislature, "which shall then fill such vacancies." If the vacancy be filled, the appointee's term is at an end; if not filled, the legislature has failed to carry out the mandatory provision of the Constitution, and by clear implication the temporary appointment lapses.

GEORGE SUTHERLAND.

I concur in the foregoing views.

WILLIAM P. DILLINGHAM.



Calendar No. 128.

63^D CONGRESS, }
2^d Session. }

SENATE.

{ REPT. 160,
Part 3. }

CREDENTIALS OF BLAIR LEE AS SENATOR FROM MARYLAND.

JANUARY 22 (calendar day January 24), 1914.—Ordered to be printed.

Mr. BRADLEY, from the Committee on Privileges and Elections, submitted the following

MINORITY REPORT.

[To accompany S. Res. 247.]

I am unable to agree with the majority report, but agree with the minority report except in so far as it concedes by implication or otherwise that the election and term, or any part of the term, of a Senator elected or chosen before the seventeenth amendment became valid as part of the Constitution and enforceable by the enactment of the necessary legislation therein required is governed by the amendment.

The intent and meaning of that amendment must be determined from its language and not from supposition. The people expressed their intention through their representatives who ratified that amendment. To say they did not know what they desired, or, if they did, that they did not know how to express it is a reflection upon their intelligence. The Senate, it is true, is the sole judge of the qualification and election of its Members, but in rendering judgment should act strictly within the law and not exercise arbitrary power.

The proposal and adoption of the seventeenth amendment grew out of a desire of a majority of the people to correct what they believed a great evil. In the discussion of the manner in which this evil should be corrected, both oral and written (preceding and following the proposal of the amendment), the rights of Senators elected under the old system or the filling of vacancies in their offices was never alluded to. The people merely intended to inaugurate a new system, to wit, to elect Senators in the future, after the terms of those in office had expired, by popular vote. The amendment was a complete revolution in the system of electing Senators, as well as in supplying vacancies, and clearly and explicitly states its object.

2. CREDENTIALS OF BLAIR LEE AS SENATOR FROM MARYLAND.

Below is set forth, in parallel columns, the Constitution as it existed before and since the adoption of the amendment, and the amendment:

ARTICLE I.

SEC. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years, and each Senator shall have one vote. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year; and if vacancies happen by resignation or otherwise *during the recess of the legislature of any State, the executive thereof may make temporary appointments (until the next meeting of the legislature, which shall then fill such vacancies).*

SEC. 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

It appears, in the first place, under the amendment, that each State shall be entitled to two Senators, who shall be elected by the people thereof for six years.

It will be noted that these Senators are elected for the full period of six years.

In the next place, it provides that—

when vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies, etc.

Now, we inquire what vacancies are referred to? Evidently vacancies in the representation provided for in the terms of Senators *elected by the people*. This we must assume because the vacancies can refer only to Senators so elected and specified in the previous portion of the amendment. To say that the amendment refers to vacancies in the terms of Senators elected by the legislature, when it has no reference to Senators so elected and does not even mention them up to this point, is an unjustifiable interpretation. In other words, such a construction does violence to the purpose of the amendment. A specific way for filling vacancies in the terms of Senators *elected by the people is provided*, to wit, the governor may appoint when empowered to do so and shall issue writs of election when the vacancies shall be filled by the vote of the people as directed by the legislature. The Senator having been chosen by the people, a vacancy in his office is to be filled by the people.

The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof*, for six years, and each Senator shall have one vote. Electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.*

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as a part of the Constitution.

Under the old rule a Senator was elected by the legislature and, after temporary appointment by the governor, during the recess of the legislature, his successor was chosen by the legislature in the same way in which he was elected.

It seems that this is the only construction authorized, without taking into consideration the after provision of the amendment; but in order to make the meaning of the amendment even plainer, it is declared that it shall not—

be so construed as to affect the election or term of any Senator chosen before it becomes valid as a part of the Constitution.

If the intention was to supply vacancies in the offices of previously elected Senators, why insert this saving clause? But we are told that this was done lest it might be supposed that the old Senators were removed. Surely no such contingency could be apprehended, for they had been elected for a fixed term, and the express purpose of the amendment was to *elect* and not to *remove* Senators. A construction that all the old Senators were removed by the amendment would have been ridiculous, for its necessary result would be to eliminate the entire Senate. The framers were men of extraordinary intelligence and never for a moment apprehended that such an interpretation would be contended for by any man of sound mind, or, if contended for, would be sustained.

We can not for a moment think that the saving clause was inserted to prevent an interpretation so ridiculous; nor, on the other hand, can we assume that the saving clause was mere surplusage, inserted without purpose. It seems perfectly plain that the purpose of that clause was to place beyond all dispute any contention concerning the election or terms of Senators chosen before the amendment became valid and enforceable. In other words, the saving clause means exactly what it says.

When the circumstances existing at the time of the proposal of this amendment are taken into consideration, the intention of the framers of the instrument is made even plainer if possible. They knew that it was not certain that the amendment would be adopted, although it was confidently believed that it would be. They knew that the time when it would be adopted was exceedingly uncertain, as it would require a considerable period for three-fourths of the States to act. They knew that the legislatures convened in some of the States annually, in some biennially, in some triennially, and in some quadrennially. This would necessarily affect not only the time consumed in ratifying the amendment, but also the election of Senators under the same and the necessary time consumed in legislation and notices of the holding of elections after it became part of the Constitution. Besides the framers were fully aware of the intense struggle that took place in the Constitutional Convention when the basis of senatorial representation was fixed. They knew that section 1, Article V, of the Constitution, in order to prevent further agitation, provided against any change of that basis by the express provision "that no State, without its consent, shall be deprived of its equal suffrage in the Senate." They knew, too, that this section did not contemplate alone that no State could be *permanently* deprived of its right but that it could not be so deprived for any length of time by constitutional amendment, and that such an amendment would

itself be unconstitutional. Hence the saving clause was eminently wise and proper.

We must assume that these contingencies were taken into consideration, and the further reasonable certainty that vacancies would occur in the offices of some of the Senators during that period; hence the intention was to prevent any conflict between the Constitution and the amendment, and to prevent any hiatus in the representation of any State.

The amendment itself was not self-executing, because while the governor is given the right to appoint he can only do so when empowered by act of the legislature; and while he is given the right to issue the writ of election, it follows from the amendment that the election can not be held until provided for by the legislature, and then held as the legislature may direct. It was not intended that the amendment should be retrospective; on the contrary, it was prospective. Indeed, the principle of law is universal that all statutes and constitutions shall be construed prospectively unless an intention to the contrary is so plainly expressed as to render such construction impossible.

The amendment had no application to the past; it was aimed entirely at the future. While intended to confer power on the people to elect their Senators by popular election, as directed by the legislature, the object of the saving clause was to prevent any conflict between the old law and the new, as well as any interregnum in the representation of Senators elected or chosen under the old rule.

A specious attempt to escape this construction is made by the contention that the word "affect," as used, has a limited meaning, referring only to the lengthening or shortening of the term. The lexicographers and synonymists, however, do not give any reason for such an interpretation; on the contrary, they give every reason for an entirely different construction. In other words, they give the plain, every-day meaning to the word as it is understood not only by the people but by the courts.

Webster's Unabridged Dictionary says that the meaning of the word "affect" is "*to act upon, to produce an effect or change.*" He gives as synonyms of the word, "*influence, operate or act on, concern, move, overcome, impair.*"

Soulé in his work on synonyms gives the synonyms of the word "affect" as "*influence on, act upon, work upon, concern.*"

In *Home Building Loan Association v. Nolan* (21 Mont., 205) the meaning of the word was held to be "*operate on, act upon, or concern.*"

In the case of *Ryan v. Carter* (93 U. S. S. C., 78) the Supreme Court of the United States construed the word "affect" as "*having been used in the sense of acting injuriously upon persons and things.*" Such interpretation," said the court, "*accords with the reason and manifest intention of the proviso, unsettles no confirmed title, and secures to the inhabitants the protection that Congress thought proper to afford.*"

In *Baird v. St. Louis Hospital* (116 Mo., 419) the court held that the word "affect" meant "*that the statute should not be so construed as to 'prejudice or injuriously affect such rights.'*"

In *Conniff v. City* (4 E. D. Smith, 430) the New York court held that the meaning of the word "affect" was "*to act upon or produce a change.*"

In *Clark v. Riddle* (101 Iowa, 270) the court held that the meaning of the word "affect" was "*to act upon or change.*"

In *Holland v. Dickerson* (41 Iowa) it was held that the use of the word "affect" was *to prevent any change of preexisting rights.*

At page 1159 of the *Encyclopedia of Law and Procedure* the general rule is laid down that the word "affect" means "*to have effect upon, to influence; but often used in the sense of acting injuriously upon persons and things, and sometimes in the sense of 'vary'.*"

According to these definitions, this amendment means that the election or term of any Senator chosen before the same became valid as a part of the Constitution, *shall not be acted upon, affected, concerned, enlarged, changed, prejudiced or injuriously affected, impaired, worked upon, varied, aimed at, influenced, or operated upon.*

The word "term" has a fixed and legal meaning, being purely impersonal. If the object of the seventeenth amendment was to affect the old Senators in any part of their term, the word "tenure" would have been used. We can not for a moment think that the framers of the amendment did not know the difference between the meaning of the two words. When the amendment says that the "election or term" shall not be affected, it speaks of the term as one consecutive period, and it follows that if the term can not be affected, no part of it can be, for the word "term" embraces all its parts, and is not susceptible of partition. Not only so, the amendment after declaring that "it shall not be construed so as to affect the election or term of any Senator," adds the significant word "*chosen.*" This word refers equally to an election and an appointment, and was used to cover the case of an appointed Senator, for he remains in office until his successor is elected by the legislature meeting after the appointment.

It may be that under the amendment an election for the regular term may be provided by the Congress, as the amendment does not specifically say that it can not be done, though in my judgment the implication is by no means clear.

In other words, the Constitution, as it stood prior to the amendment regarding regular elections, may not be superseded by the amendment, but it is perfectly plain that the Congress can not provide for a special election to fill a vacancy in the office of a Senator elected by the people. The people having changed the method of selecting a Senator, may not object to legislation by Congress affecting a general election. But they evidently determined to prevent Congress from legislating as to the manner of supplying vacancies; hence the amendment specifically provides that in case of vacancy (alluding to terms of Senators elected by the people) the *legislature of any State* may empower the governor to make temporary appointments until the people fill the vacancy by election *as the legislature may direct.* The legislature alone may direct the time, place, and manner of the election, and Congress has no power to direct it. A special agency having been selected and designated in the amendment necessarily excludes every other agency.

We are forced to this conclusion, too, by the significant fact that the power which, under the old rule, was conferred on Congress to provide for the election of Senators is not only omitted from the amendment as to the regular term, but completely revolutionized as to the manner in which vacancies are to be filled.

However, it is unnecessary in the decision of this case, that we should settle the grave doubt which presents itself as to whether Congress can provide by legislation for the regular election of a Senator, for that is not the issue. The only question here is as to legislation concerning the filling of vacancies. No one will contend that Congress can provide by legislation for temporary appointment; and yet it has as much power to do that as to provide for special elections.

The State legislature alone can authorize the governor to appoint, and it alone can direct the time, place, and manner of holding the election to supply vacancies. It would be useless for the governor to appoint a Senator temporarily, for this he could not do until authorized by the legislature. It would be equally useless for him to issue a writ of election until the legislature had directed the time, place, and manner of such election. In both instances the legislature alone can put the amendment in force.

The obvious purport of the amendment is that the States shall be given time to provide necessary legislation to make it effective. This plainly appears in the third paragraph, and no other interpretation can be given without destroying the meaning of the words employed and doing violence to the plain principles of justice.

The construction that the provisions of the Constitution existing before the amendment became valid as a part of the Constitution, and capable of enforcement by legislation, should govern the terms of Senators (and vacancies therein) elected under it, prevents all friction and uncertainty as well as any hiatus in representation, because under its provisions the governor can appoint during a recess of the legislature and that body, after it convenes, can elect for the remainder of the term.

Evidently the governors of the various States so construed the amendment, or they would have called special sessions of the legislatures to enforce its provisions.

The fact that under this view the failure of any State to adopt proper regulations would leave the amendment ineffective is attributable entirely to the failure of the framers to make it specific and self-executing. This is unfortunate, but nevertheless true, and we are confronted by a condition, not a theory.

That vacancies may be filled in different ways and at different times during the same period results from the election of Senators every two years, and hence vacancies may occur at different times, some in places of Senators elected under the old and some under the new rules, until the terms of all Senators under the old rule have expired.

If it be true that Congress can legislate, then such legislation should be adopted; but if the States alone can act, they must legislate to put the amendment in force. Meanwhile the old rule will apply, for it can not be supposed for a moment that until proper legislation is enacted the wheels of government shall be clogged or remain motionless.

(See Cooley's Const., 7 ed., pp. 98-100, 119; 8 Cyc., pp. 752 (and footnote), 753, 759, 760 (and footnote 10), 761 (and footnote 16), 762-763 (and note 33), and the many authorities cited at each page; Ex Parte State of Alabama, 52 Ala., 231; Brown v. Seay, 86 Ala., 124; State v. Gardner, 3 S. Dak., 553; Black v. Ada County (Idaho), 44 Pac. R., 734.)

The rule laid down generally in the foregoing authorities that if a State fails to provide legislation to make enforceable a constitutional provision not self-executing, there is no remedy, may not apply in this instance should it appear that the State had purposely failed and refused to do its duty, because the Senate in such case might refuse admission to a Senator elected or chosen under the old rule for a regular term accruing after the amendment became valid, or the filling of a vacancy in such term.

The State of Maryland can not be punished by depriving it of its equal suffrage in the Senate because Congress failed to make the proposed amendment self-executing.

It was argued before the committee that the governor might call a special election when there was no law authorizing it, and the person chosen at such election would be recognized. To sustain this contention the case of Hoge, who was elected Representative in Congress under such circumstances from Pennsylvania and was admitted, and later cases in which similar action was had, were cited, as also McCrary on Elections. In each of the cases mentioned a Member of the Lower House of Congress was elected, *but at the time there was a State statute providing for the general election of Representatives in Congress*, and in Pennsylvania the special election was held at the time fixed therein. It must be borne in mind that this case is distinguished from them in that *there is not a State statute, specific or otherwise, authorizing the election of a United States Senator in Maryland*. The theory upon which the decisions cited was reached was that there being a statute authorizing and fixing the manner of holding regular elections for Representatives in Congress, the governor could call a special election, which could be held under the terms of the general law. Those cases have no bearing on the question in issue here. Especially is this true, not only because there is no statute authorizing or regulating the election of a Senator, but because the amendment points out plainly how the elections for Senator are to be provided for, and no law has been passed conforming thereto. To hold that such a procedure could be pursued in the election of a United States Senator as was pursued in the election of a Representative in the Lower House in the cases mentioned would be an open and flagrant disregard of the fundamental law, and would enable the governor, who is only an executive officer, to legislate.

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